

1-1-1981

Libel Law in the Twenty-First Century: Defamation and the Electronic Newspaper

Stephen R. Hofer

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal

 Part of the [Communications Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

Recommended Citation

Stephen R. Hofer, *Libel Law in the Twenty-First Century: Defamation and the Electronic Newspaper*, 3 HASTINGS COMM. & ENT. L.J. 379 (1981).

Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol3/iss3/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Libel Law in the Twenty-First Century: Defamation and the Electronic Newspaper

By STEPHEN R. HOFER*

I. Introduction

During the decade just past, the American newspaper was transformed.¹ Although largely unnoticed by the reading public, a technological revolution was taking place in the industry. This revolution, its profound impact still only incompletely experienced or appreciated, already must be said to rival in importance the nineteenth century inventions of the linotype and rotary press,² or even Gutenberg's fifteenth century development of movable type.³

The decade was ushered in by the first widespread use of computerized phototypesetting equipment and the conversion of the Associated Press and United Press International wire services to electronic editing systems.⁴ By the mid-1970's, the changeover of newsrooms to optical character readers (OCRs) and cathode ray tubes/video display terminals (CRTs/VDTs) had swelled from a trickle to a torrent.⁵ As the decade neared an end, — the process of constructing entire pages, including headlines, text, photographs, and advertising, and then turning these pages into plates ready for the printing press, all orchestrated at the computer terminal — pagination — was nearing reality.⁶

* A.B., Indiana University, 1976; J.D., Northwestern University, 1980. Member of the California Bar. Associate with the law firm Gibson, Dunn & Crutcher, Los Angeles.

1. See Smith, *The Future of the Fourth Estate*, ATLAS WORLD PRESS REVIEW, Nov. 1978, at 21; Smith, *All the News That Fits in the Databank*, SATURDAY REVIEW, June 23, 1979, at 18; *The Silent Newsroom*, NEWSWEEK, Aug. 6, 1979, at 74.

2. See generally, B. BAGDIKIAN, *THE INFORMATION MACHINES* 6-10, 92-96 (1971).

3. *Id.* See *The Silent Newsroom*, *supra* note 1, at 74.

4. See *News by Computer*, TIME, Dec. 17, 1973, at 64.

5. See Smith, *The Future of the Fourth Estate*, *supra* note 1, at 22; *The Silent Newsroom*, *supra* note 1, at 74.

6. See Smith, *All the News That Fits in the Databank*, *supra* note 1, at 18; *The Silent Newsroom*, *supra* note 1, at 75; Doeblner, *Computer Composition Systems Evolving Rapidly*,

Automation has thus left an indelible impression upon the entire newspaper production process, making it, in a sense, another electronic medium. The transformation has, at the same time, radically altered the working responsibilities of the editor, the reporter, and the printer. But bigger changes still are yet to come, and it is these future changes, involving even greater automation and, ultimately, home delivery via television, that can be expected to have a major influence upon the body of law that governs the press in this country. This article will consider the potential impact of further newspaper computerization upon libel law and examine alternative approaches courts might utilize in balancing First Amendment press freedoms against the rights of individuals victimized by computer defamation. In addition, the article will outline the effect that automation has had on libel law in another field, that of consumer credit reporting, with a view toward determining whether courts might find precedent there for re-thinking current doctrines of newspaper defamation as applied to the electronic newspaper.

II.

The Telescreen Newspaper

In the future, informational systems of all different types, ranging from newspapers and television news to library reference services, airline timetables, and movie theatre schedules, to name only a few, can be expected to become more inter-connected in their preparation, production, and delivery.⁷ The incredible speed and storage capacity of the computer makes this development practical and, indeed, inevitable. But while the computer will facilitate this metamorphosis, it will be in the home television set that the average information consumer will actually see the change. It is through the medium of television, the thirty-year-old rival of the newspaper,⁸ that, ironically enough, the transformation of newspa-

PUBLISHERS WEEKLY, Aug. 5, 1974, at 40.

7. See Carne, *The Wired Household*, IEEE SPECTRUM (published by the Institute of Electrical and Electronics Engineers, Inc.), Oct. 1979, at 61; Tobin, *Computer With the Green Eyeshade*, SATURDAY REVIEW, May 10, 1969, at 70.

8. See Smith, *The Future of the Fourth Estate*, supra note 1, at 24; Tobin, *Computer With the Green Eyeshade*, supra note 7, at 69.

The convergence of newspaper and television technology, after years of competition for both news and advertising dollars, can be explained in part by this statement made by Philip Meyer, director of news research for Knight-Ridder Newspapers:

Newspaper companies are buying cable [television companies] because we want to avoid the classic mistake of rail companies who thought they were in the railroad business and found out too late that they were in the transportation busi-

pers may eventually become a transfiguration.

As computerization of the production process nears completion,⁹ newspaper executives have begun to contemplate the next possible step: automation of the delivery system.¹⁰ Delivery by such an automated system would enable the daily newspaper reader to view stories, photographs, advertisements, and comic strips, not as a printed product impressed in ink on paper, but as electronic images appearing on his television screen. The reader would work the crossword puzzle in much the same way as a person playing with the video games already on the market today. And if he wanted to clip a coupon or save a story for his scrapbook, he would simply activate a home printer attached to his television receiver.

This is no Flash Gordon fantasy. The electronic or "telescreen" newspaper, as this article will refer to it, is already in its infancy in Great Britain,¹¹ and home information retrieval systems of various types are the subject of extensive research in France, Japan, Canada, Sweden, Finland, and most recently the United States.¹² Ex-

ness. We realize that we are in the information business, not just the newspaper business.

Sanoff, *Electronic Newspapers: Will They Be Here Soon?*, U.S. NEWS & WORLD REPORT, May 11, 1981, at 61. In the same article, Robert Marbut, president of Harte-Hanks Communications, Inc., was quoted as saying: "The new technology is fast bringing all media into a common arena. The distinctions . . . that made television different from newspapers are now blurring." *Id.*

9. The vast majority of the nation's 1,500 newsrooms were automated during the 1970s. *The Silent Newsroom*, *supra* note 1, at 74.

10. Sanoff, *Electronic Newspapers: Will They Be Here Soon?*, *supra* note 8, at 61; B. BAGDIKIAN, *supra* note 2, at xxxii-xxxiv. See notes 11, 12 & 20 and accompanying text, *infra*.

11. See *Teletext and Viewdata — A Primer*, IEEE SPECTRUM, Oct. 1979, at 63. Merry, 'Newspaper' arrives on English (TV) Channel, Chicago Tribune, May 18, 1980, § 5, at 7, col. 1. Great Britain today has the most advanced and operational home information retrieval systems in the world. The British Broadcasting Company (BBC), the Independent Broadcasting Authority (IBA) and the British Post Office all now offer such services to a limited, but rapidly growing number of customers. The BBC system, known as Ceefax, and the IBA service, known on the commercial television channels as Oracle, both represent developments of the "teletext" method, see note 13 and accompanying text, *infra*, and by mid-1980 could be received by decoders connected to more than 40,000 television sets in the United Kingdom, up from only 7,000 sets in mid-1979. The Post Office, which also operates the telephone network in Britain, has developed a "viewdata" system based on telephone transmission, see note 14 and accompanying text, *infra*, that is known as Prestel. Initial Prestel service was offered to London-area customers in March, 1979, and within the first year 3,000 subscribers, most of them business offices, purchased Prestel sets. A Prestel client is charged each time he makes use of the system, while the only cost for a teletext user is when he buys a decoder for an existing set or a new television set specifically designed to receive teletext. See also Winsbury & Lane, *Britain's Electronic Information Service*, ATLAS WORLD PRESS REVIEW, Sept. 1979, at 54.

12. See *Teletext and Viewdata — A Primer*, *supra* note 11, at 63. In the United States,

perimentation has focused primarily on two different delivery methods, known generically as teletext and viewdata.

In teletext, information is encoded by a digital computer and then transmitted along with a regular television signal. As part of a broadcast system, the data can be sent one-way only, but it is transmitted continuously on a repeating basis, and a decoder attached to the television receiver intercepts the information requested by the viewer as that particular signal rotates past.¹³

the Columbia Broadcasting System (CBS), KSL-TV in Salt Lake City, Utah, and cable television suppliers in Philadelphia, Pennsylvania, and Crystal Lake, Illinois, had begun teletext transmitting experiments as of mid-1979, and both the New York Times Corp. and Dow Jones & Co. have since announced plans for pilot projects to test reader interest in teletext. KSL's system was capable of transmitting 800 screen-size "pages" of information, which is about the equivalent of a 50-page newspaper. See *TV Turns to Print*, NEWSWEEK, July 30, 1979, at 73.

In early 1980, Knight-Ridder Newspapers, Inc. and Southern Bell, an American Telephone and Telegraph subsidiary, began test-marketing the first American viewdata service in the Miami area. Miami Herald, Nov. 29, 1979, at 17; see *Knight-Ridder to Test Home Electronic Info System*, EDITOR AND PUBLISHER, April 12, 1980, at 7. Plans for a nationwide, experimental viewdata system that would enable subscribers to read stories from 11 different newspapers from around the country and the Associated Press wire service also were announced in 1980 by A.P. McCain, *Newspapers vs. Computers: The Press Hedges Its Bets*, TECHNOLOGY REVIEW, Nov.-Dec. 1980, at 72. The possibility of combining teletext and viewdata systems in such a way as to take advantage of their various strengths also is being studied at KSL in Salt Lake City. Robinson & Loveless, "Touch-Tone" Teletext — A Combined Teletext-Viewdata System, IEEE TRANSACTIONS ON CONSUMER ELECTRONICS, July, 1979, at 298.

The research being conducted in Sweden and Finland and by Bell Canada is based on the British Prestel standards. See note 14 and accompanying text, *infra*. Other viewdata systems in the experimental stage differ from Prestel and include Captains, a Japanese development designed to cope with the complexities of the Katakana alphabet, and Telidon, a system developed by the Canadian Department of Communications that permits transmission of images of photographic clarity in addition to more conventional computer graphics. In France, experimentation is being carried out involving both the teletext and viewdata methods. Other countries now considering the development of national systems based on one or more of these techniques include West Germany, the Netherlands, Switzerland, and Spain.

13. Harden, *Teletext/Viewdata LSI*, IEEE TRANSACTIONS ON CONSUMER ELECTRONICS, July, 1979, at 353; *Teletext and Viewdata — A Primer*, *supra* note 11, at 63; *TV Turns to Print*, *supra* note 12, at 73. Teletext is possible because the conventional television picture does not use all of the lines of spectrum space available at any one time. In the United States, 21 lines (known as the "blanking interval") of the 525 lines being transmitted at any moment in a television broadcast are reserved for technical purposes; in Great Britain, the blanking interval takes up 50 lines of a 625-line transmission. Teletext utilizes these blank lines to send its encoded messages in much the same way that closed captioning systems already use the blanking interval to send the dialogue of telecasts to viewers with hearing problems. The teletext data remains invisible on the screen unless a viewer has a decoder which can replace the regular programming on the screen with the teletext information. The limited number of lines available in the blanking interval makes it impossible to transmit large amounts of information because viewers would be forced to wait for excessively long

Viewdata, on the other hand, is a two-way interactive system, in which the decoder is connected to the viewer's telephone line as well as his television. The user requests the story he wishes to see by punching buttons on a small keyboard terminal or a modified pushbutton telephone, and the data is transmitted to the individual household from a data base connected through the public telephone network.¹⁴

As mentioned above, it seems likely that a variety of different information services will become available through home data retrieval systems, including some that do not even exist today. One possibility is a national electronic "newspaper" designed specifically for telescreen transmission.¹⁵ Such a national medium could be realized in the United States through an interconnected network of community access or cable television (CATV) systems and domestic communications space satellites.¹⁶ The *Wall Street Journal* may be the forerunner of such a national newspaper. Traditionally of interest to a nationwide audience, the *Journal* has, since 1974, been able to speed delivery to its business-oriented readership by photocomposing its pages, then transmitting a facsimile image of the page through computer impulses dispatched via a geosynchronous satellite to regional printing plants.¹⁷ In the future, the *Journal*, as well as other newspapers of national importance, may simply bypass the printing plant and transmit their products directly to the reader's television set.

Another possible role for the electronic newspaper might be that of a general repository of local or national information. Both the serious researcher and the casually curious reader might enjoy

periods of time for requested pages to be transmitted. But if a teletext system used the entire television signal — on an otherwise unused cable channel, for example — hundreds of pages could be transmitted simultaneously. See Renner-Smith, *Data-Display TV Links Your Home With Huge Info Banks*, POPULAR SCIENCE, January, 1981, at 72.

14. *Teletext/Viewdata LSI*, *supra* note 13, at 353; *Teletext and Viewdata — A Primer*, *supra* note 11, at 63.

15. See Gross, *Info-Text, Newspaper of the Future*, IEEE TRANSACTIONS ON CONSUMER ELECTRONICS, July 1979, at 295.

16. *Id.* See also Sanoff, *Electronic Newspapers: Will They be Here Soon?*, *supra* note 8, at 61-62.

17. Smith, *The Future of the Fourth Estate*, *supra* note 1, at 24. Dow Jones & Co., publisher of The Wall Street Journal, already has announced plans to begin a teletext experiment in cooperation with the Dallas Morning News. McCain, *Newspapers vs. Computers: The Press Hedges Its Bets*, *supra*, note 12 at 73. And the Gannett Company, the nation's largest newspaper chain, also is contemplating a system of satellite transmission to printing plants across the country as a means of establishing a national newspaper. Sanoff, *Electronic Newspapers: Will They be Here Soon?*, *supra* note 8, at 62.

easy, inexpensive, and instantaneous access to world news, past and present, via the television computer. *The New York Times Information Bank*, operational since 1973, is the prototype of such a system. *The Times Bank* includes a comprehensive index to everything that has appeared in that newspaper since 1969, plus information from more than sixty other publications and eight wire services. The Bank is expanded constantly through the recordation of nearly 1,000 new entries each day.¹⁸

Experts in this field do not believe that the printed newspaper will ever be completely abandoned.¹⁹ The newspaper printed on paper has, for the foreseeable future, the obvious advantage of portability, as well as an historical acceptance that will undoubtedly generate initial resistance to a non-printed product. At the same time, however, problems created by reliance on paper are growing, including heightened competition from faster electronic media for advertising and subscriber revenues, steadily increasing costs of labor, paper, and printing supplies, periodic newsprint shortages, and growing environmental concern over both the large amount of solid waste that newspapers generate and the resulting expense that communities encounter in its disposal.²⁰ If the problems inherent in the traditional newsprint delivery system are not alleviated, and there is no indication they will be, then alternatives to the electronic newspaper will continue to grow more attractive. Electronic delivery would offer several advantages both to newspapers and their subscribers. For the reader, there are the twin attractions of speed and convenience. For example, a person interested in a rapidly developing international crisis would be able to read in depth about the problem as soon as an editor keyed an edited story into the accessible data base. This would present all the speed of modern-day broadcasting, along with the detail that only a traditional newspaper can provide. For the newspapers — which in many cases have already computerized their billing, classified and display advertising, newsroom operations, and some of the composing room functions — telescreening would offer the

18. *Timely Times*, SATURDAY REVIEW, July 26, 1975, at 8; Smith, *The Future of the Fourth Estate*, *supra* note 1, at 23.

19. Interviews with Michael Kinerk, newsroom systems manager of the Miami Herald, and Michael Thompson, electronics engineer for the American Newspaper Publishers Association Research Institute (December, 1980). See also B. BAGDIKIAN, *supra* note 2, at xxxiii; *Data Processing: News and More — by Computer*, BUSINESS WEEK, Feb. 18, 1980, at 110.

20. See B. BAGDIKIAN, *supra* note 2, at xxxii-xxxvi; Sanoff, *Electronic Newspapers: Will They Be Here Soon?*, *supra* note 8, at 61.

opportunity for substantial economic savings by further reducing dependence on costly manpower and eliminating the time and transportation problems presented by large circulation delivery areas.²¹ The advantages that computerization offers in contending with the present-day problems of traditional newspapers seem to make the electronic newspaper virtually inevitable.²² One expert now actively involved in telescreen research says, "At some point in the 21st century, television will certainly become the predominant newspaper delivery mode."²³

This introduction to the computerized future of the newspaper industry suggests a number of possible legal questions that such technological change will raise. Indeed, the legal implications of electronic newspapers are wide-ranging, notwithstanding the traditional freedoms and privileges enjoyed by the press under the First Amendment to the United States Constitution.²⁴ Questions that

21. *Id.*

22. The biggest barrier to widespread development of the electronic newspaper in the immediate future is the cost of automation, both to newspaper publishers and to consumers. Smith, *The Future of the Fourth Estate*, *supra* note 1, at 24; Sanoff, *Electronic Newspapers: Will They Be Here Soon?*, *supra* note 8, at 61; *TV Turns to Print*, *supra* note 12, at 74-75; *Data Processing: News and More — by Computer*, *supra* note 19, at 106. The initial capital outlay will involve millions of dollars and only the largest newspaper chains or corporations, such as Knight-Ridder, Gannett, and the Los Angeles-based Times-Mirror Corporation, have the financial resources to attempt such a major undertaking on their own. Once the technological facilities are in place, however, it will be much less costly for smaller newspapers to enter the electronic field.

Consumers also will be faced with large initial expenses including the cost of a decoder for a teletext system or user line charges for a viewdata operation. For example, as of mid-1980, a teletext-equipped color television set cost \$1,100 in Great Britain, or \$450 more than a comparable set without teletext capacity. *'Newspaper' arrives on English (TV) Channel*, *supra* note 11. Once decoders go into mass production, however, it is predicted they will add only about \$50 to the cost of a new television set, while conversion of an existing set will run about \$150. User charges are also expected to decrease. *TV Turns to Print*, *supra* note 12, at 74-75.

Despite the huge start-up costs involved, experts such as George Minot, senior vice president of the Columbus, Ohio-based firm of CompuServe, believe that after the initial expenses are incurred, costs will decline very rapidly. Supporters of electronic newspapers also point out that the expenses associated with the existing system of paper delivery are increasing dramatically and these costs also will tend to make the electronic system more competitive with the printed form.

23. Interview with Michael Kinerk (December, 1980), *supra* note 19.

24. The First Amendment provides, in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I. This simple commandment has been interpreted over the years to include specific protection for news gathering by the press, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated"), and the editorial process, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and

will no doubt arise include: Will the delivery system be regulated, and if so will it be as a common carrier or as a broadcaster? What impact will antitrust and unfair competition law have on system ownership and operation? What copyright protection will be afforded "electronic newspaper stores?" How will the new technology affect the right of privacy? And what will occur in the area of defamation law as a result of the developing technology? The remainder of this article will address only the last of these questions, dealing with defamation. The other questions, while deserving extended scholarly attention, will not be dealt with here.

The Electronic Newspaper's Impact upon the Elements of Libel

Defamation, whether by libel or slander, and regardless of the means of communication utilized, involves certain legal elements that must be proved in order to establish liability. These elements, according to the Second Restatement of the Law of Torts, include:

- (1) A false and defamatory statement concerning another;
- (2) an unprivileged publication to a third party;
- (3) fault amounting at least to negligence on the part of the publisher; and
- (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.²⁵

There is no reason to believe that the changeover of newspapers from printed delivery to electronic transmission would have any impact upon the first and fundamental requirement that the plaintiff prove the existence of a false and defamatory statement. As to the other elements, however, the development of the electronic newspaper may necessitate some reconsideration of what defamation is and how it is proved.

The second element involves what is known as "publication." The legal meaning of the word publication is different from the

content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press").

25. RESTATEMENT (SECOND) OF TORTS § 558 (1977). See also B. SANFORD, SYNOPSIS OF THE LAW OF LIBEL AND THE RIGHT OF PRIVACY 8-9 (1977). With the exception of fault, the elements of defamation are the outgrowth of centuries of common law development. The requirement of fault in cases involving the press, which ended strict liability for libel as applied to news media, was first imposed by the U.S. Supreme Court in its decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964).

definition commonly applied to that word by journalists or the general public. At law, publication is defined as the dissemination of defamatory material to a third person who comprehends the defamatory nature of the communication and is capable of identifying the plaintiff as the subject of the defamation.²⁶ Any means of communication that conveys the defamatory idea is sufficient to effect a publication: defamation need not be printed or written in order to have been published.²⁷ A libelous communication can be conveyed by the exhibition of a picture,²⁸ and courts repeatedly have held that words spoken on radio or television broadcasts can constitute defamatory publication.²⁹ Given the wide variety of me-

26. W. PROSSER, *LAW OF TORTS* § 113 (4th ed. 1971); L. ELDREDGE, *THE LAW OF DEFAMATION* § 36 (1978).

27. W. PROSSER, *supra* note 26, § 113; A. HANSON, *LIBEL AND RELATED TORTS* § 68 (1969); *RESTATEMENT (SECOND) OF TORTS* § 577, Comment a (1977).

28. *Burton v. Crowell Pub. Co.*, 82 F.2d 154 (2d Cir. 1936); *Louka v. Park Entertainments*, 294 Mass. 268, 1 N.E.2d 41 (1936).

29. While several courts have addressed the issue of defamation through radio or television, it is not entirely clear whether such defamation constitutes libel or slander, although the trend is to treat it as libel. *See Shor v. Billingsley*, 4 Misc. 2d 857, 158 N.Y.S.2d 476 (1956), *aff'd*, 4 App. Div. 2d 1017, 169 N.Y.S.2d 416 (1957), *appeal denied*, 5 App. Div. 2d 768, 170 N.Y.S.2d 976 (1958). The two forms of defamation traditionally have been distinguished by their form of transmission, libel generally being written and slander generally being oral. The traditional rationale for this distinction lies in the less permanent nature of the spoken word and its more limited area of dissemination. The modern characteristics of electronic broadcasting, however, render these differences practically meaningless. The regulations of the Federal Communications Commission require licensees to maintain records of everything they broadcast and one of the ways in which this requirement is fulfilled is by keeping scripts, videotapes, and other recordings of everything that is transmitted. 47 C.F.R. §§ 73.111, 73.281, 73.581, 73.622, 73.669. Furthermore, statistics demonstrate that the audience for national network broadcasts over radio or television far exceeds the circulation of the largest newspapers and magazines. In any case, all courts appear to agree that if a defamatory broadcast is read from a script and not ad-libbed, then the script already contains a libel, and republication of the libel by reading it over the air is itself a libel. *See, e.g., Gearhart v. WSAZ, Inc.*, 150 F. Supp. 98 (E.D. Ky. 1957), *aff'd*, 254 F.2d 242 (6th Cir. 1958); *Sargent v. National Broadcasting Co.*, 136 F. Supp. 560 (N.D. Cal. 1955); *Hartmann v. Winchell*, 296 N.Y. 296, 73 N.E.2d 30 (1947); *Landau v. Columbia Broadcasting Sys.*, 205 Misc. 357, 128 N.Y.S.2d 254 (1954), *aff'd*, 1 App. Div. 2d 660, 147 N.Y.S.2d 687 (1955); *Gibler v. Houston Post Co.*, 310 S.W.2d 377 (Tex. Ct. App. 1958).

In *Shor v. Billingsley*, the court held that a defamation action sounded in libel rather than slander even though the defamatory dialogue was not read from a prepared script, the judge reasoning that broadcasting's vast and far-flung audience made defamatory utterances as potentially harmful to a person's reputation as a publication by writing, and that "permanence of form" was not a necessary prerequisite to libel. 4 Misc. 2d at 864, 158 N.Y.S.2d at 484. Section 358, Comment f, of the American Law Institute's *First Restatement of Law of Torts*, published in 1938, provided that a broadcast defamation was to be libel if read from a prepared script or notes and that extemporaneous comments might be either libel or slander depending on such factors as the area of dissemination and the premeditation involved. *The Second Restatement of the Law of Torts*, published in 1977, abandoned this largely unworkable distinction, and § 568A states that all broadcast defamations are to be treated

dia through which a defamation can be published, it appears certain that the transfer of newspaper stories from the printed page to the television screen would not affect a court's finding that the publication requirement had been met.

It can be argued, of course, that words glowing momentarily on a TV screen lack the permanence associated with the printed word. In the early days of broadcasting, attorneys for radio stations attempted to draw a similar distinction, arguing that oral defamations by their clients should be treated as slander rather than libel.³⁰ In the case of printed information being displayed on a television screen, however, the distinction is neither particularly accurate, nor especially relevant from a legal perspective.³¹ The visual nature of the publication, the capacity for permanent storage of the information, and the potential for tremendous impact and injury all lead to the conclusion that defamation in the elec-

as libel, regardless of whether they are read from a script. State statutes generally have avoided the issue by referring only to "broadcast defamation."

In California, two lower court decisions have held that broadcast defamation is treated as slander in that state, but in neither case was the defamation read from a script. *Arno v. Stewart*, 245 Cal. App. 2d 955, 54 Cal. Rptr. 392 (1966); *White v. Valenta*, 234 Cal. App. 2d 243, 44 Cal. Rptr. 241 (1965). A Georgia court coined the word "defamacast" in order to avoid having to call the defamation either libel or slander, but the defendant was held to liability standards appropriate to libel. *American Broadcasting-Paramount Theatres, Inc. v. Simpson*, 106 Ga. App. 230, 126 S.E.2d 873 (1962).

The legal nature of transmissions of printed texts displayed visually on television has not been litigated so far, but it seems clear from the precedential distinctions based on the use of scripts that defamation in such transmissions would be treated as libel.

The distinction between libel and slander is important in the development of this new technology because it is generally easier for a plaintiff to maintain a cause of action for libel than for slander. This is because a person who believes himself to have been slandered cannot recover unless he demonstrates that he has suffered "special damages" (actual pecuniary loss) or that the slanderous statement falls into one of four traditional, specific, and limited categories. One state supreme court has said, "[T]he scope of liability is greater for libel, and the pleading requirements are less strict." *Spence v. Funk*, 396 A.2d 967, 970 (Del. 1978).

30. As noted in note 29, *supra*, the court in *Shor v. Billingsley*, 4 Misc. 2d 857, 864, 158 N.Y.S.2d 476, 484 (1956), *aff'd*, 4 App. Div. 2d 1017, 169 N.Y.S.2d 416 (1957), *appeal denied*, 5 App. Div. 2d 768, 170 N.Y.S.2d 976 (1958), ruled, *inter alia*, that "'permanence of form' is not necessarily a prerequisite to a libel." A commentator later suggested that this interpretation was correct and that a libel would remain so even if the script from which it was read was later destroyed and the writing had thus "dissolved." Note, *Torts: Defamation: Libel-Slander Distinction*, 43 CORNELL L.Q. 320, 324 (1957). More recently, it has been suggested that a similar rule would apply to defamatory messages read on a computer video display screen and then returned to storage. Stevens & Hoffman, *Tort Liability for Defamation by Computer*, 6 RUTGERS J. COMPUTERS & L. 91, 93 n.11 (1977). California Civil Code section 46 defines slander as "a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means . . ."

31. See notes 29 and 30, *supra*.

tronic newspaper will be treated as published libel. First of all, even momentary viewing is legally sufficient for publication as long as the defamatory meaning is communicated and comprehended. One court has said that whenever a defamation is "designed for visual perception," it is a libel.³² Furthermore, several technological aids will be associated with the telescreen newspaper that will contribute to its permanence. It can be assumed that as time passes more advanced television receivers will have connected home printers that will enable the viewer to obtain, if he wishes, printouts of the stories he has seen on the screen. Even if the viewer has no desire to secure a printout, the libelous story will remain in the data base until transferred or erased, and thus could be called back to the screen repeatedly.³³ The telescreen viewer also may have a "stop-action" capacity in his set that will enable him to "freeze" particular passages on the screen for more comprehensive examination. Finally, even after a story is cleared out of a currently active and immediately accessible data base, newspapers still will undoubtedly utilize some sort of data storage capacity — since they have for more than a century kept bound volumes of old issues and topically indexed folders of clippings filed away in a "morgue" — that will lend additional permanence to each day's computerized product. Indeed, future data storage methods will probably allow easier access than those utilized today, and this easier accessibility might cause further problems in the case of computerized defamations that previously had appeared in the newspaper. This possibility will be considered in greater detail in the discussion of remedies below.

While it is unlikely that the changeover of newspapers to electronic transmission will affect the publication requirement in defamation actions, it is conceivable that this conversion could have a legal impact on the third and fourth elements of defamation mentioned above, those being fault and injury.

Under the common law system, all American jurisdictions presumed general damages for libel on its face, or libel *per se*,³⁴

32. *Whitby v. Associates Discount Corp.*, 59 Ill. App. 2d 337, 207 N.E.2d 482 (1965).

33. *Stevens & Hoffman*, *supra* note 30, at 93 n.11.

34. Libel *per se* or libel on its face is a statement that is defamatory without requiring any extrinsic facts in order to show that a defamatory meaning was conveyed; that is, it is injurious to reputation on its face. Libel *per se* differs from libel *per quod* in that a statement that is libelous in the latter sense becomes defamatory only when the third-party recipient is in possession of extrinsic knowledge that gives the communication a libelous meaning. Libel *per quod* will not support a cause of action unless the plaintiff can offer

merely from the fact of publication.³⁵ But the law in the area of libel injury has been evolving ever since the Supreme Court's revolutionary 1964 decision regarding the constitutional privilege of the press in *New York Times Co. v. Sullivan*.³⁶ That case and its progeny have left the elements of fault and injury inextricably intertwined. Currently, it can be said that there is no presumption of damages in a libel action brought against an institution of the press if the plaintiff is a private person (*i.e.*, not a public figure), and the media defendant does not violate the *New York Times* standard for actual malice: whether the publication was made with knowledge of its falsity or with reckless disregard for its truth or falsity.³⁷ If actual malice is demonstrated, by any plaintiff, courts may award presumed or punitive damages.³⁸ If, on the other hand, a private plaintiff merely proves negligence on the part of the news medium that does not rise to the level of actual malice, he can recover damages only if he can show "actual injury."³⁹ Actual injury has not been defined by the Court, although it has said that such injury is not limited to out-of-pocket loss, but can also include loss of reputation, personal humiliation, and mental anguish.⁴⁰ There must be "competent evidence" of this injury⁴¹ — although it need not be assigned an actual dollar figure⁴² — and it is in this area that computer data on story usage could have an impact on a court's determination of damages. If a newspaper built its new delivery system around the viewdata method or any other type of interactive data retrieval system, records could be maintained as to the number of times any story was called for by viewers. This sort of access information would offer a far more reliable indication of how many people had seen the libel than could the gross circulation figures compiled by newspapers today. Courts might permit evidentiary discovery of such access records, thus enabling the trier of fact to quantify better either impairment of reputation or loss of standing in the community by more accurately

proof of "special damages," *i.e.*, actual pecuniary loss. W. PROSSER, *supra* note 26, § 112.

35. W. PROSSER, *supra* note 26, § 112. RESTATEMENT (SECOND) OF TORTS § 569 (1977); L. Eldridge, *supra* note 26, § 95 at 537.

36. 376 U.S. 254 (1964).

37. *Id.* at 279-80. See *Time, Inc. v. Firestone*, 424 U.S. 448, 452-57 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-50 (1974).

38. 418 U.S. at 348-49.

39. *Id.*

40. *Id.* at 349-50.

41. *Id.* at 350.

42. *Id.*; see 424 U.S. at 460.

determining the actual extent of defamatory publication. Hence, the resulting amount of recoverable damages could more accurately reflect the actual harm done.

At early common law, every repetition of a defamation constituted a new publication or "republishing" and gave rise to a separate and additional cause of action.⁴³ This rule, carried to its extreme, would have made a newspaper with a circulation of 200,000 copies potentially liable for 200,000 separate counts of libel in a civil action. To avoid such a harsh result, most American courts have adopted the "single publication" rule, under which an entire edition of a newspaper or other periodical is generally treated as only one publication for legal purposes.⁴⁴ The single publication rule was codified by the Commissioners on Uniform State Laws in the Uniform Single Publication Act,⁴⁵ and was written into both

43. W. PROSSER, *supra* note 26, § 113. *Duke of Brunswick v. Harmer*, 14 Q.B. 185, 117 Eng. Rep. 75 (1849), was the case that first established this doctrine. Despite the development of the single publication rule, the *Duke of Brunswick* holding has not lost all of its vitality. See *Anselmi v. Denver Post, Inc.*, 552 F.2d 316, 325 (10th Cir.) *cert. denied*, 432 U.S. 911 (1977); *Lewis v. Reader's Digest Ass'n, Inc.*, 162 Mont. 401, 512 P.2d 702 (1973).

44. The single publication rule first began to take form in an 1892 decision of the New York Court of Appeals involving repetition of a slander, *Enos v. Enos*, 135 N.Y. 609, 32 N.E. 123 (1892). Its further development can be traced in a series of late 19th century and early 20th-century cases, including *Galligan v. Sun Printing & Publication Ass'n*, 25 Misc. 355, 54 N.Y.S. 471 (1898); *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S.W. 496 (1907) (Graves, J., dissenting); *Murray v. Galbraith*, 86 Ark. 50, 109 S.W. 1011 (1908); and *Age-Herald Publishing Co. v. Huddleston*, 207 Ala. 40, 92 So. 193 (1921).

A New York court expanded the concept in *Wolfson v. Syracuse Newspapers, Inc.*, 254 A.D. 211, 4 N.Y.S.2d 640 (1938), *aff'd*, 279 N.Y. 716, 18 N.E.2d 676 (1939), when it ruled that a two-year statute of limitations was not extended in the plaintiff's favor because a third party had seen the allegedly defamatory material while examining bound volumes of prior issues in the defendant's newspaper office more than a year after the story originally had been published. *But cf. Winrod v. McFadden Publications, Inc.*, 62 F. Supp. 249, 252 (N.D. Ill. 1945), in which the court disputed the *Wolfson* rationale in factual situations in which a publisher reprints a prior issue or, subsequent to the original distribution, sells unsold copies of the issue containing a libel. "The publisher of a libel has it entirely within his own control as to his actions with reference thereto. . . . [I]f the publisher chooses to subsequently sell unsold copies of the magazine containing the libel, then the publisher by his own act has chosen to again send out to the public the magazine containing the libel."

The question that would be raised in the case of a computerized and publicly accessible newspaper morgue would be to what extent did the publishing company have morgue usage within its control. This would depend, in part, on what alternative sources a user might have available for obtaining access to the morgue (*e.g.*, a public library's separate storage system if such a data base stood separately from the newspaper's), or whether a morgue was part of an overall community information system, such as the British Prestel system.

45. The Uniform Single Publications Act, adopted in 1952 by the National Conference of Commissioners on Uniform State Laws, provides in Section 1 as follows:

No person shall have more than one cause of action for damages for libel or slander or invasion of privacy or any other tort founded upon any single publica-

the Second Restatement of the Law of Torts and the Second Restatement of Conflict of Laws.⁴⁶

Such a rule is adequate to deal with a situation in which today's libel disappears into dusty bound volumes or envelopes of clippings and seldom if ever again sees the light of day. However, a rather different problem is presented when a newspaper "morgue" becomes more readily accessible to readers who can call up past stories for home viewing merely by typing in commands on a terminal keyboard.⁴⁷ Compounding the impact of such simple recall is the likelihood that morgues throughout the country will be interconnected as part of a national information network.⁴⁸ Problems will arise if there are conflicts of laws between different jurisdictions as a result of such interstate republication. The uncertain applicability of statutes of limitations also will create difficulties.⁴⁹

tion or exhibition or utterance, such as any one edition of a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or television or any one exhibition of a motion picture. Recovery in any action shall include all damages for any such tort suffered by the plaintiff in all jurisdictions.

The Uniform Single Publications Act has been enacted in seven states: ARIZ. REV. STAT. § 12-651; CAL. CIVIL CODE § 3425.1; IDAHO CODE § 6-702; ILL. REV. STAT. Ch. 126, §§ 11 to 15. N.M. STAT. ANN. § 41-7-1; N.D. CENT. CODE § 14-02-10; 42 PA. CONS. STAT. § 8341. Although the Uniform Act itself has been adopted in only seven states, the general rule concerning single publication liability is observed in the majority of jurisdictions. W. PROSSER, *supra* note 26, § 113.

A close reading of Uniform Single Publications Act Section 1 makes it apparent that the statute is not as all-protective as might be assumed from its title. Even in jurisdictions that have adopted the Act, its language would not protect a news or entertainment medium from additional liability where the libel is published in each of the different daily editions of a metropolitan newspaper, or in the rebroadcast of a particular program on radio or television, or in the continuous repetition of a motion picture in theatres. A contrary result was reached in *Belli v. Roberts Brothers Furs*, 240 Cal. App. 2d 284, 49 Cal. Rptr. 625 (1966), but it must be observed that the California Legislature had changed the wording of the Uniform Act from "edition" to "issue" in the clause concerning newspapers, and the court took note of this change in reaching its result. *Id.* at 287-89, 49 Cal. Rptr. at 628. In *Cox Enterprises, Inc. v. Gilreath*, 142 Ga. App. 297, 235 S.E.2d 633 (1977), a Georgia court of appeals held that an alleged libel published in four different editions of the Atlanta Constitution created four different causes of action. Georgia has not adopted the Uniform Single Publications Act, but it does have a similar single publications rule contained within its statutes and the policy also is encompassed in the common law of the state. *Id.*, 235 S.E.2d at 634.

46. RESTATEMENT (SECOND) OF TORTS § 577A (1977); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 150, 153 (1969).

47. See note 44, *supra*.

48. Interview with Michael Kinerk (December, 1980) *supra* note 19. See also Tobin, *Computer With the Green Eyeshade*, *supra* note 7, at 69.

49. W. PROSSER, *supra* note 26, § 113; L. ELDREDGE, *supra* note 26, § 38; Prosser, *Interstate Publication*, 51 MICH. L. REV. 959 (1953).

Given such circumstances, it will undoubtedly be difficult, if not impossible, to "keep a good libel down." The single publication rule, by itself, will be inadequate to protect both the injured and responsible parties in a computer-era telescreen libel action. Other remedies must thus be considered.

III.

The Electronic Newspaper's Impact upon Remedies For Libel

The traditional remedy for defamation has been an action at law for damages. It has often been said that "a court of equity will not enjoin the publication of a libel"⁵⁰ on the rationale that damages afford an adequate remedy for libel and thus, under traditional common law rules, preclude any sort of equitable relief.⁵¹ This rule owes its origin to early nineteenth century English law,⁵² but has

50. *Robert E. Hicks Corp. v. National Salesmen's Training Ass'n*, 19 F.2d 963, 964 (7th Cir. 1927).

51. See, e.g., *Willis v. O'Connell*, 231 F. 1004, 1014-16 (S.D. Ala. 1916); *Kuhn v. Warner Bros. Pictures, Inc.*, 29 F. Supp. 800, 801 (S.D.N.Y. 1939); *Kwass v. Kersey*, 139 W. Va. 497, 81 S.E.2d 237 (1954).

52. The rule was first enunciated as dictum in *Gee v. Pritchard*, 36 Eng. Rep. 670 (1818). Lord Chancellor Eldon, in reaching his decision in *Gee*, stated that equity would not enjoin publication because libelous publication was a crime, and equity had no jurisdiction to prevent the commission of crimes. Having said this, however, the Lord Chancellor still granted the injunction because he found the plaintiff, who was the writer of some letters that had been delivered to the defendant, to have a sufficient property interest in rights of property and privacy derived from his authorship of the letters. It thus must be said, as Dean Pound perceived, that *Gee* is a weak foundation for the far-sweeping rule banning equitable relief for defamation. See Pound, *Equitable Relief against Defamation and Injuries to Personality*, 29 HARV. L. REV. 640 (1916).

The dictum in *Gee* actually had a greater long-term impact in the United States than it did in England. During the mid 19th-century, British courts disagreed over the question of whether equity could enjoin a libel. *Dixon v. Holden*, L.R. 7 Eq. 488 (1869), granting an injunction against a knowingly false publication which stated that the plaintiff had defrauded creditors; *Prudential Assurance Co. v. Knott*, L.R. 10 Ch. App. 142 (1875), denying injunction to plaintiff who claimed that certain statements made about its insurance premiums in a pamphlet published by defendant were untrue. At about the same time, Parliament was enacting legislation which made the granting of equitable relief by common law courts easier. Common Law Procedure Act of 1854, 17 & 18 Vict., c. 125, §§ 79, 81, 82; Judicature Act of 1873, 36 & 37 Vict., c. 66, § 16). After some uncertainty, the English courts began abandoning the *Gee* prohibition of injunctive relief for libel. Initially, it was held that continued publication could be enjoined once a jury had found material to be libelous. *Saxby v. Easterbrook and Hannaford*, L.R. 3 C.P.D. 339 (1878). Later, it was also held that courts could grant interlocutory injunctions even where a jury had not yet decided the question of libel, although this power was to be exercised with great caution and only in cases where the court found clear evidence of defamation. *Bonnard v. Perryman*, [1891] 2 Ch. D. 269; *Liverpool Household Stores Ass'n v. Smith*, L.R. 37 Ch. D. 170 (1887); *Quartz Hill Co. v. Beall*, L.R. 20 Ch. D. 501 (1882). Other notable decisions include: *Hayward & Co.*

taken deep root in American soil, fertilized by the strict commandment of the First Amendment.⁵³ The Supreme Court has on occasion stated that defamation is a form of speech that is not protected by the First Amendment,⁵⁴ but these pronouncements predate the decision in *New York Times Co. v. Sullivan* and there is some question about their continuing validity.⁵⁵ For the most part, courts are extremely sensitive to the constitutionally imposed prohibition against prior restraints on free speech and free press, and guard against that spectre.⁵⁶ It would seem, however, that

v. Hayward & Sons, 34 Ch. D. 198 (1886) (injunction against trade libel granted even though plaintiff had shown no evidence of damages); *Kerr v. Gandy*, 3 T.L.R. 75 (1886) (enjoining continued publication of a newspaper advertisement); *Thomas v. Williams*, 14 Ch. D. 864 (1880) (perpetual injunction against trade libel), and *Thorley's Cattle Food Co. v. Massam*, 14 Ch. D. 763 (1880) (enjoining trade libel). The final step taken by the English courts was their decision that there was no logical distinction between the granting of injunctions in cases involving defamation of trade or property and cases involving defamation of character or personality. See note 71, *infra*.

53. A. HANSON, *supra*, note 27, § 170.

In 1839, 92 years before the First Amendment was applied to the states through the Fourteenth Amendment, New York's Chancellor Walworth said that the power to enjoin libel "cannot safely be entrusted to any tribunal consistently with the principles of a free government." *Brandreth v. Lance*, 8 Paige Ch. 24, 26 (1839). In *Brandreth*, although Chancellor Walworth also sustained the defendant's demurrer on the ground that equity protects property rights but not personal rights, citing *Gee v. Pritchard*, 36 Eng. Rep. 670, for the latter proposition, it was the reference to the constitutional guarantees of freedom of speech and of the press that made this case an American judicial landmark. *Brandreth* still retains vitality and is regularly cited. See, e.g., *Reliance Insurance Co. v. Barron's*, 428 F. Supp. 200, 205 (S.D.N.Y. 1977).

54. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

55. See *Herbert v. Lando*, 441 U.S. 153, 158 (1979) ("Until *New York Times*, the prevailing jurisprudence was that '[l]ibelous utterances [are not] within the area of constitutionally protected speech . . .') and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) ("[T]his Court has extended a measure of strategic protection to defamatory falsehood"). But cf. *Gertz*, *id.* at 340 ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

56. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

The U.S. Supreme Court has never said that injunctive relief is *per se* unconstitutional in the context of free speech or press rights. However, the Court has said that the prior restraint of speech — that is, the enjoining or prohibition of speech prior to its initial publication — is "the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. at 559. A plaintiff seeking to impose a prior restraint bears a "heavy burden of showing justification for the imposition of such a restraint." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). In the context of a publication that threatens national security, the party seeking to enjoin publication must show that it will suffer serious and irreparable injury. *New York Times Co. v. United States*, 403 U.S. at 726-27, 730. It should be remembered, however, that the emphasis of these cases is upon *prior restraint*, and none of the holdings addresses the question of

there is a difference between attempts to enjoin defamation before the initial circulation to the public and a later effort aimed at preventing continuing distribution of material already adjudged defamatory.⁵⁷ Such a difference might well be of constitutional dimensions.

The First Amendment notwithstanding, courts already have acknowledged the power to grant injunctions against continuing defamation in a variety of contexts, including:

- the posting of a libelous roadside billboard that falsely alleged that poisons from an industrial plant had killed cattle and endangered humans;⁵⁸
- writing on the side of an automobile which blamed an auto dealership for alleged failure to repair the vehicle;⁵⁹
- picketing of a builder's housing development;⁶⁰
- false and defamatory statements made by a former stockholder in a private hospital corporation concerning his ex-business partner;⁶¹
- defamatory press releases and other remarks made by a state attorney general concerning the defendants in an unfair trade practices prosecution prior to the trial of that case;⁶²
- false, malicious, and defamatory statements made by a newspaper and other defendants in an effort to persuade the depositors of a trust company to boycott the trust company because of its allegedly incompetent management;⁶³

whether continued publication of material already found to be libelous might be enjoined.

57. See A. HANSON, *supra* note 27, § 170.

58. *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978 (D. Or. 1963), *appeal dismissed*, 336 F.2d 876 (9th Cir.), *aff'd*, 337 F.2d 780 (9th Cir. 1964).

59. *Menard v. Houle*, 298 Mass. 546, 11 N.E.2d 436 (1937).

60. *West Willow Realty Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196, *appeal dismissed*, 10 A.D. 2d 1002, 205 N.Y.S.2d 810 (1960).

61. *Wolf v. Gold*, 9 A.D.2d 257, 193 N.Y.S.2d 36 (1959); *rehearing and appeal denied*, 10 A.D.2d 561, 196 N.Y.S.2d 600 (1960).

62. *Shevin v. Thuotte*, 339 So. 2d 253 (Fla. App. 1976).

63. *Lawrence Trust Co. v. Sun-American Pub. Co.*, 245 Mass. 262, 139 N.E. 655 (1923). This is the only appellate decision noted in which a media institution was enjoined from continued publication of allegedly defamatory material, and it must be emphasized that the Supreme Judicial Court of Massachusetts addressed itself primarily to the injury suffered by the trust company as a result of the newspaper articles that had been published, rather than their libelous character as such. At one point, the court states that the complaint does not contain allegations that any of the articles are libelous in character "for which special damages are claimed." However, the opinion then quotes some of the allegations, including a charge that the defendants had made and circulated "false, malicious, misleading and defamatory statements of and concerning the business and credit" of the trust company. *Id.* at 265, 139 N.E. at 655-56. Apparently the court's initial statement meant that the defamation, if any, was libel *per quod*, provable only by a showing of special damages, and not libel *per se*. The court concluded "[i]t is manifest that a case is stated of intentional disparage-

— an ex-husband's harassment of his former wife through letters, pamphlets and slanderous statements;⁶⁴ and

— a former lover's harassment of his one-time girlfriend through statements made to the woman's new fiancé and to the police, in addition to physical assaults.⁶⁵

A federal judge, commenting on the general rule that prohibits the enjoining of defamation, wrote:

Even though as of today the majority American rule [is against the enjoining of defamatory publications] as stated by [*Robert E. Hicks [Corp. v. Nat'l Salesmen's Training Ass'n]*] . . . nevertheless, when that rule or decision is . . . recognized to be without logic, reason and justification in justice, fair dealings and equity, or any other bases for continued existence in modern commerce, it is a judicial necessity that the rule be cut down and discarded.⁶⁶

It may be noted that many, although not all, of these decisions involve actions brought to enjoin trade libel, and that they predate the Supreme Court's rulings in recent years that commercial speech is entitled, in certain circumstances, to at least some of the First Amendment protection enjoyed by other forms of speech.⁶⁷ Such an observation in no way negates the earlier conclusion that plaintiffs may seek injunctive relief from continuing defamation after its initial publication, nor suggests that such relief should be limited only to defamations affecting business interests.⁶⁸ American courts have enjoined violations of the personal right of privacy in cases unrelated to business or commerce,⁶⁹ and English courts,

ment of the plaintiff's business by false and misleading statements published by the defendant company" *Id.* at 266, 139 N.E. at 656. This is obviously a finding of trade libel, although described by its alternate name of disparagement.

64. *Dickson v. Dickson*, 12 Wash. App. 183, 529 P.2d 476 (1974), *cert. denied*, 423 U.S. 832, *reh. denied*, 423 U.S. 991 (1975).

65. *Hawks v. Yancey*, 265 S.W. 233 (Tex. Ct. App. 1924).

66. *Martin v. Reynolds Metals Co.*, 224 F. Supp. 978, 983 (D. Or. 1963), *appeal dismissed*, 336 F.2d 876 (9th Cir.), *aff'd*, 337 F.2d 780 (9th Cir. 1964) (citing *Robert E. Hicks Corp. v. Nat'l Salesmen's Training Ass'n*, 19 F.2d 963 (7th Cir. 1927)).

67. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975). The Court has taken the position that commercial speech which communicates useful information to the public is entitled to more First Amendment protection than speech proposing a commercial transaction only.

68. See A. HANSON, *supra* note 27, § 170; Pound, *supra* note 52; Note, *Developments in the Law — Injunctions*, 78 HARV. L. REV. 994 (1965).

69. See *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973); *State ex rel. Mavity v. Tyndall*, 224 Ind. 364, 66 N.E.2d 755 (1946); *Binns v. Vitagraph Co. of America*, 210 N.Y. 51, 103 N.E. 1108 (1913); *Clayman v. Bernstein*, 38 Pa. D. & C. 543 (Philadelphia Co. C.P. 1940). See also *Ali v. Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978), and *Hansen v. High Society*, 5 Med. L. Rptr. 2398 (N.Y. Sup. Ct. 1980), both recognizing a plaintiff's right to injunctive relief prohibiting further distribution of a magazine where it contained material that consti-

which long ago abandoned the rule prohibiting the enjoining of libel,⁷⁰ also have discarded the distinction between defamations affecting trade or property rights and those involving character or personality alone.⁷¹

In one case that did not involve any sort of commercial or trade libel, a Washington state appellate court clearly acknowledged that the First Amendment was affected by the injunction under review, but then still upheld the enjoining of a libel. In *Dickson v. Dickson*,⁷² the court stated that First Amendment rights are not absolute and endorsed a balancing test where other rights also were implicated. The court then said: "If the First Amendment right is not deemed paramount, injunctive relief is appropriate if there is no adequate remedy at law,"⁷³ and concluded that, given the circumstances of the case,⁷⁴ the injunction under review did not deny the defendant his First Amendment rights.

Of the cases discussed above, only one involved a newspaper or other agency of the organized news media, and that decision, rendered in 1923, focuses on disparagement rather than libel.⁷⁵ Furthermore, the U.S. Supreme Court, in its decisions thus far concerning attempts to impose equitable remedies upon newspapers, has held such actions to be violative of the First Amendment. These Supreme Court rulings, however, have dealt either with at-

tuted an appropriation of the plaintiff's right to publicity. Both decisions were based upon New York statutes that protect against invasion of privacy, and the *Ali* decision was also grounded upon the common law right of privacy.

70. See note 52, *supra*.

71. See *Monson v. Madame Tussauds, Ltd.*, [1894] 1 Q.B. 671, 690, L.J.Q.B. (n.s.) 63, 454, 466. (Lord Halsbury: "Something was said as to the procedure being only applicable to trade libels. I think the suggestion is quite unfounded. . . . [W]hatever may have been the interest of such discussions, the Judicature Acts have rendered all of them idle. In all cases where the Court shall think it just and convenient, the remedy [of injunction] exists. I should have thought the protection of a man's character much more important than the protection of his trade.") *Id.* at 698, L.J.Q.B. (n.s.) 63 at 471. (Lord Justice Davey: "I see no logical distinction for this purpose between a case of libel affecting trade or property and one affecting character only.") Also, *Dunlop v. Dunlop Rubber Co.*, [1920] 1 I.R. 280, 310 (Judge Powell: "[I]t appears to me to be plain that a Judge . . . has jurisdiction to hear and determine whether or not an injunction should be granted to restrain the publication of libel, even though the libel is not alleged to be injurious to trade, and that in the exercise of this jurisdiction there is no logical distinction between a case of libel affecting trade or property and one affecting character only."); R. Mc Ewen & P. Lewis, *GATLEY ON LIBEL AND SLANDER*, ¶ 1379, n.81 (7th ed. 1974).

72. 12 Wash. App. 183, 529 P.2d 476 (1974), *cert. denied*, 423 U.S. 832 (1975).

73. 12 Wash. App. at 187, 529 P.2d at 478.

74. See text accompanying note 64, *supra*.

75. *Lawrence Trust Co. v. Sun-American Pub. Co.*, 245 Mass. 262, 139 N.E. 655 (1923). See note 63 and accompanying text, *supra*.

tempts to prohibit initial publication through legislative or judicial prior restraints,⁷⁶ or with a legislatively enacted right-of-reply statute that the Court found interfered with the editorial freedom of newspaper publishers.⁷⁷ While accepting the wisdom of these holdings, it still does not seem that the First Amendment would prohibit an equitable remedy imposed upon a telescreen newspaper, if it were tailored to fit constitutional limitations.

Although today's technology would permit many types of change in the storage media containing the memory of previous editions, it is extremely doubtful that judges ever could, or would, order a defamatory story to be completely erased, or even altered.⁷⁸ Such a suggestion is utterly repulsive in light of the American tradition of First Amendment press freedom and brings to mind this harrowing passage from the terrifying novel, *1984*:

The messages he had received referred to articles or news items which for one reason or another it was thought necessary to alter, or, as the official phrase had it, to rectify This process of continuous alteration was applied not only to newspapers, but to books, periodicals, pamphlets, posters, leaflets, films, sound tracks, cartoons, photographs — to every kind of literature or documentation which might conceivably hold any political or ideological significance. . . . In this way every prediction made by the Party could be shown by documentary evidence to have been

76. See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). In these cases, the initial right to circulate information to the public was affected. This article should not be understood to support any suggestion that any such initial prohibition of the electronic publication of a libel could or should be constitutionally upheld.

77. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974). In *Tornillo*, a state law required a newspaper to publish a response from a political candidate to the newspaper's own editorial opinions. The initial right to circulate information also was involved here, because the required reply had to appear in all copies of an edition of the newspaper, in derogation of the newspaper staff's editorial decisions as to what materials should appear in its publication. The Supreme Court held that this right-of-reply statute forced newspapers to print replies not only to statements claimed to be factually erroneous, but also to editorial opinions of the newspaper. In addition, the statute permitted private parties to demand the right of reply without any prior judicial determination of error or fault. For these reasons, the statute could not stand.

78. There are a few precomputer era decisions in which courts have held that a party was under an affirmative duty to remove a defamatory publication made by another, as in the case of a defendant's bulletin board that was being used to communicate a libelous message. See *Byrne v. Deane*, 1 K.B. Div. 818 (1937). *Accord*, *Fogg v. Boston & Lowell Railroad Corp.*, 148 Mass. 513, 20 N.E. 109 (1889); *Woodling v. Knickerbocker*, 31 Minn. 268, 17 N.W. 387 (1883). See also W. PROSSER, *supra* note 26, § 113. None of these decisions involves the press, and they do not raise the serious First Amendment concerns that an order to remove a clipping or story from a newspaper's records would raise.

correct; nor was any item of news, or any expression of opinion, which conflicted with the needs of the moment, ever allowed to remain on record. All history was a palimpsest, scraped clean and reinscribed exactly as often as was necessary.⁷⁹

If the proposed scope of equitable relief is narrowed, however, it may be possible to imagine an acceptable system of correction. One such remedy might take the form of an order prohibiting further republication of the already published material, now found to be defamatory, without prior court approval. Another more interesting and perhaps more acceptable possibility might be a requirement that notice of the judicial determination be placed into the data base.⁸⁰ This relief probably could not be extended to the point of requiring the electronic newspaper to publish in a current edition available by transmission to its entire readership the fact that a court of law had determined that previously published material was defamatory. Such a decree would likely run afoul of the Supreme Court's 1974 decision in *Miami Herald Publishing Co. v. Tornillo*⁸¹ and judicial interference with the on-going editorial process would probably find no more favor than did the legislative mandate in that case. At the same time, however, remedial action involving only a limited supplementing of the original publication would stand a better chance of surviving constitutional scrutiny.

Under this latter approach, an equitable remedy might involve an order that some sort of new entry be added to the magnetic tape or other storage media at the original location of the defamatory article, explaining that the publication had been found by a court of law to be libelous and detailing the reasons for that holding.⁸² Because permanent corrections of this sort could be made in

79. G. ORWELL, 1984, at 39-41 (1949).

80. The reason why this second alternative might be more acceptable than the first is that it would not prevent recirculation of the defamatory material. Even if a telescreen article already had been found to be libelous, a newspaper's editors might still feel they had some overriding reason that justified republication. If the newspaper is willing to accept the potential consequences, including the possibility of a second adverse judgment and assessment of punitive damages, it perhaps should be the First Amendment right of the editors to take such a risk.

81. 418 U.S. 241 (1974).

82. Such a remedy would serve a function somewhat similar to that of the present-day newspaper retraction, although it should be remembered that under current legal doctrine and statutory enactments, retraction is not a defense to, or a remedy in a libel action, but may only mitigate damages. *Werner v. Southern California Assoc. Newspapers*, 35 Cal. 2d 121, 216 P.2d 825 (1950), *appeal dismissed*, 340 U.S. 910 (1951); CAL. CIV. CODE § 48a (Deering 1971); TEX. REV. CIV. STAT. ANN. art. 5430 (Vernon 1958). See A. HANSON, *supra* note 27, §§ 180, 183, 195; B. SANFORD, *supra* note 25, at 22.

data bases with relative ease and without necessitating current or further alterations, there is little reason to fear legal interference with the editorial process or judicial rewriting of newspaper records. And because there will likely be fewer post-publication storage tapes in existence than the large number of bound volumes kept in scattered locations today, and these tapes will probably be housed in a smaller number of storage sites, it will be easier for a court to confirm that there has been compliance with its order in equity. Finally, given the easy accessibility to computerized morgues that remote terminals will provide, and the resulting likelihood of greater morgue use, it would seem that such a remedy, when combined with compensatory damages, will compensate a defamed plaintiff more adequately than damages alone. Such complete relief is one of the traditional purposes of equity.

Of course, editors and attorneys representing computerized newspapers in the future will have an important role to play in seeing that any system of inserting notice of a judicial finding of libel into newspaper records is applied in a constitutional manner. These editors and attorneys will have to insist zealously that changes never be ordered in a data base for any sort of political or ideological reason. The distinctions drawn by the Supreme Court in recent years between public figures and private citizens⁸³ might actually work to the benefit of the media in pressing this argument. At the same time, however, courts will have a responsibility to act with sensitivity in balancing press freedoms against the harm that could be done by the perpetual retention of an uncorrected libel in easily accessible computer files. In this context, it is worth considering the recent legislative and judicial responses to the problem of erroneous and libelous computer records maintained by credit reporting agencies.

IV.

Computer Usage and Libel in the Credit Reporting Context

Some insight into the problems and solutions that may result from the computerization of the newspaper delivery system can be gleaned from the experience of another communications industry that already has undergone sweeping automation — the credit reporting business. Commercial credit reporting services, or “credit

83. See notes 36 & 37 and accompanying text, *supra*.

bureaus," are private companies that specialize in collecting and organizing information about individuals and businesses which they then offer for sale to financial institutions, retail merchants, employers, insurance companies, and other credit suppliers. This information generally concerns the credit history and character of potential customers or employees. Since the founding of the first credit reporting firms in the mid-nineteenth century, this industry has grown into a network of more than 2,000 agencies, capable of generating, as of 1967, reports on more than 110 million Americans.⁸⁴

Traditionally, courts have held that credit bureaus are protected from tort liability for defamation or invasion of privacy by a qualified privilege when they are requested to and do communicate their reports to individuals or companies with a legitimate business interest in the information.⁸⁵ This privilege is conditioned on the good faith of the agency making the report, and a credit bureau is therefore usually shielded from liability for simple negligence in circulating erroneous credit reports.⁸⁶ If, however, a plaintiff can demonstrate "actual malice" on the agency's part in addition to error, then the qualified privilege will be lost and the plaintiff will be able to recover damages. Early decisions in this area generally required a showing of actual or express malice, in the sense of ill will,⁸⁷ but in more recent years, courts have begun to apply a definition to the word "malice" that is very similar to the one utilized by the Supreme Court in the newspaper libel privilege case, *New York Times Co. v. Sullivan*.⁸⁸ As applied to credit bureaus, malice

84. See, e.g., A. WESTIN, *DATABANKS IN A FREE SOCIETY — COMPUTERS, RECORD-KEEPING AND PRIVACY* 132 (1972); Note, *Protecting the Subjects of Credit Reports*, 80 YALE L.J. 1035 (1971). Credit bureaus flourish because credit suppliers want to minimize their business risks and because they believe that commercial reporting services can provide accurate information for less expense than they would incur if they attempted to gather it themselves.

85. See *Watwood v. Stone's Mercantile Agency, Inc.*, 194 F.2d 160 (D.C. Cir.), cert. denied, 344 U.S. 821 (1952); *Stationers Corp. v. Dun & Bradstreet, Inc.*, 62 Cal. 2d 412, 42 Cal. Rptr. 449, 398 P.2d 785 (1965); Annot., 30 A.L.R.2d 776 (1953) and Later Case Service (1981); Annot., 40 A.L.R.3d 1049 (1971).

86. *Id.*

87. See *Hooper-Holmes Bureau v. Bunn*, 161 F.2d 102 (5th Cir. 1947); *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S.W. 668 (1903); Annot., 30 A.L.R.2d 776 (1953).

88. 376 U.S. 254 (1964). Actual malice was defined by the Court as "knowledge that [a statement] is false or . . . reckless disregard for whether it was false or not." *Id.* at 280. The Supreme Court of Texas held that the *New York Times* definition of actual malice was applicable in a libel action against a credit reporting agency in *Dun & Bradstreet, Inc. v. O'Neil*, 456 S.W.2d 896 (Tex. 1970). Some courts have held that credit bureaus are not entitled to the protection of the *New York Times* standard. See *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir.), cert. denied, 415 U.S. 985 (1974); *Grove v. Dun & Bradstreet*,

in the legal sense may consist of actual ill will, but it also can be established by showing conduct on the part of the credit agency that evidences either a reckless disregard for, or a conscious indifference to, the rights of the plaintiff.⁸⁹ One court found that the failure of a credit agency to take remedial measures, where it refused either to retract an erroneous report or to issue a corrected report upon request, was sufficient evidence of malice to uphold a jury's verdict in a libel action.⁹⁰

Persons libeled by credit bureau reports generally have asked, as far as the reported cases demonstrate, only for damages and not for injunctive relief.⁹¹ This is presumably a result of attorneys' awareness of the dogmatic judicial antipathy to equitable remedies in libel actions. However, in one recent case in which the issue was raised, a federal court made it clear that "[g]ranting or denying a preliminary injunction rests within the discretion of this Court."⁹² The injunction was not granted, but that was because the credit reporting agency had deleted the erroneous information from its files and sent out a corrective report to all subscribers who had received the libelous material, and the court did not feel it should limit the defendant's credit reporting any further.⁹³ In a case where injunctive relief was not sought, a state appellate court upheld a jury's finding that an automobile manufacturer's credit subsidiary had libeled a buyer when it forwarded incorrect information to a credit bureau, "especially," the court said, "when coupled with a gross failure to take any steps to correct the lies it transmitted."⁹⁴

The problem with complete legal dependence upon common law libel actions and damage remedies in order to provide relief from erroneous or malicious credit reporting was that such a solution never anticipated the explosive impact the computer would have on the collection, organization, transmission, and volume of credit

Inc., 438 F.2d 433 (3d Cir.), *cert. denied*, 404 U.S. 898 (1971), but those decisions were based on findings that the contents of consumer credit reports are not matters of "public interest," and the courts did not challenge the use of the *Times* malice definition itself.

89. See *Dun & Bradstreet, Inc. v. Nicklaus*, 340 F.2d 882 (8th Cir.), *cert. denied*, 382 U.S. 825 (1965); *Dun & Bradstreet, Inc. v. Robinson*, 233 Ark. 168, 345 S.W.2d 34 (1961); *In re Retailers Commercial Agency, Inc.*, 342 Mass. 515, 174 N.E.2d 376 (1961).

90. *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241 (5th Cir. 1970).

91. See generally cases cited in Annot., 30 A.L.R.2d 776 (1953) and *Later Case Service* (1981), and Annot., 40 A.L.R.3d 1049 (1971).

92. *Wortham v. Dun & Bradstreet, Inc.*, 399 F. Supp. 633, 636 (S.D. Tex. 1975).

93. *Id.* at 636-37.

94. *Vinson v. Ford Motor Credit Co.*, 259 So.2d 768, 770-71 (Fla. Dist. Ct. App. 1972).

information. As one consumer spokeswoman told a congressional subcommittee in 1969, "[w]ith the establishment of large computerized data bases, it is no longer difficult, or time-consuming, or expensive to compile life-long dossiers on all [Americans] . . . and to make easy access to them."⁹⁵ By 1967, ninety-seven million credit reports were being issued annually,⁹⁶ and it was apparent that even a small percentage of errors could involve hundreds of thousands of persons. Congress responded in 1970 to the phenomenal proliferation of computer-generated credit reports by enacting the federal Fair Credit Reporting Act (FCRA).⁹⁷

The Act's stated purpose is to require that "consumer reporting agencies adopt *reasonable procedures* for meeting the needs of commerce for consumer . . . information in a manner which is *fair and equitable to the consumer*, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information"⁹⁸ The Act specifically limits the purposes for which a consumer credit report may be furnished,⁹⁹ and it generally prohibits the reporting of obsolete information.¹⁰⁰ In instances where a consumer disputes the accuracy of the information in his record, the reporting agency is required to reinvestigate and record the current status of that information, and if the data is found to be inaccurate or no longer can be verified the agency must delete that material from its records.¹⁰¹ In addition, the consumer may request the bureau to notify anyone who has received the incorrect record within certain specified periods of time that the contested information has

95. *Hearings on S. 823 Before the Subcomm. on Financial Institutions of the Comm. on Banking and Currency*, 91st Cong., 1st Sess. (1969) (Statement of Sarah H. Newman, general secretary, National Consumers League) [hereinafter cited as *Senate Hearings*]. See also *id.* at 1-2 (Statement of Senator William Proxmire); *id.* at 30-31 (Paul Rand Dixon); *id.* at 94 (Prof. Alan F. Westin); *id.* at 113, (Erma Angevine, executive director, Consumers Federation of America).

96. *Senate Hearings*, *supra* note 95, at 11a (statement of Virginia H. Knauer, special assistant to the President for consumer affairs).

97. 15 U.S.C. § 1681 (1976).

98. *Id.* § 1681(b) (emphasis added).

99. *Id.*

100. 15 U.S.C. § 1681c (1976). Obsolete information includes bankruptcies that are more than 14 years old and any of the following that are more than seven years old: court suits or judgments, paid tax liens, accounts placed for collection, and records of arrests, indictments, or convictions, dated from the time of the disposition of the case. These exclusions become inapplicable, however, if the proposed credit transaction involves a principal of \$50,000 or more, a life insurance policy of \$50,000 or more or employment for a salary of \$20,000 or more annually. *Id.*

101. 15 U.S.C. 1681j(a) (1976).

been removed from its files.¹⁰²

The FCRA establishes civil liability for either willful¹⁰³ or negligent¹⁰⁴ noncompliance by either consumer reporting agencies or users of information who fail to comply with the law's requirements, but it does not explicitly sanction injunctive relief. It is obvious, however, that the Act presumes that credit bureaus will take affirmative action to correct erroneous information, and will, upon request, make those corrections known to those who previously have seen the incorrect data.¹⁰⁵ And in the only reported case in which a plaintiff sought to enjoin dissemination of reports alleged to violate the FCRA,¹⁰⁶ the court ruled that it had jurisdiction to grant equitable relief, stating that the defendant's continued distribution of information on microfilm or microfiche drawn from its computer data base exceeded the permissible limitations of FCRA Section 1681b, thus making appropriate "preliminary and probably final injunctive relief."¹⁰⁷

V.

A Comparative Analysis

It must be conceded that the purposes of credit information reporting are rather — although not entirely — different from those of a newspaper. The scope of First Amendment protection for the two different mechanisms of communication and types of information is arguably not the same. This was the attitude of one circuit court of appeals called upon to decide a challenge to the federal Fair Credit Reporting Act on First Amendment grounds.¹⁰⁸ While acknowledging that the Supreme Court had said, in *Bigelow v. Virginia*,¹⁰⁹ that commercial speech was entitled to some First Amendment protection, the Eighth Circuit still ruled that "consumer credit reports are not protected speech . . . under the First Amendment" and thus could be the subject of congressional regu-

102. 15 U.S.C. § 1681i(d) (1976). A person seeking employment may request notification of anyone who has received the incorrect credit report within the past two years. For all other purposes, the time limit is six months.

103. 15 U.S.C. § 1681n (1976).

104. 15 U.S.C. § 1681o (1976). In neither §§ 1681n nor 1681o are the terms "willful" or "negligent" defined. Courts are thus left to apply judicial standards in such cases.

105. See 15 U.S.C. § 1681i (1976).

106. *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp. 1092 (D. Ariz. 1974), *aff'd*, 524 F.2d 1145 (9th Cir. 1975), *cert. denied*, 424 U.S. 936 (1976).

107. 399 F. Supp. at 1096.

108. *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976).

109. 421 U.S. 809 (1975).

lation through the FCRA.¹¹⁰ Had the court adopted a constitutional balancing approach, however, it might have concluded that consumer credit reporting was indeed encompassed within the First Amendment and yet still subject to regulation under the congressional commerce clause power¹¹¹ in those instances where malice or negligence resulted in a loss of the credit agency's qualified privilege.¹¹² In the same way, the decisions in *Gertz v. Robert Welch, Inc.*,¹¹³ *Time, Inc. v. Firestone*,¹¹⁴ and most recently *Herbert v. Lando*¹¹⁵ have made it apparent that the constitutional pro-

110. 528 F.2d at 833.

111. The Constitution provides, in pertinent part: "Congress shall have power . . . to regulate commerce . . . among the several states." U.S. CONST. art. I, § 8, cl. 3.

The Supreme Court is often faced with situations where it must attempt to strike a balance between conflicting constitutional clauses, and no one on the Court, with the exception of the late Justices Black and Douglas, has ever suggested that the First Amendment's blanket assertion that "Congress shall make no law . . . abridging the freedom of speech, or of the press," note 24 *supra*, prohibits all congressional actions taken pursuant to other constitutional authority when the effect of such actions may have an impact upon speech as well. See *Haig v. Agee*, 101 S. Ct. 2766 (1981); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); *U.S. Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

112. Regarding such qualified privileges, one might recall the decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which the Supreme Court conceded that the seeking out and gathering of news is entitled to "some" First Amendment protection, but still held that newsmen could be required to appear and testify before grand juries. Many federal and state courts have since ruled that *Branzburg* actually provides the foundation for a qualified, but no absolute, newsmen's privilege. See cases cited in Comment, *The Fallacy of Farber: Failure to Acknowledge the Constitutional Newsman's Privilege in Criminal Cases*, 70 J. CRIM. L. & C. 299 (1979).

113. 418 U.S. 323 (1974). See text accompanying note 37, *supra*. This action was brought by a prominent Chicago attorney who had represented the family of a youth killed by a policeman in a civil suit against the officer. The attorney claimed he had been libeled by a politically right-wing magazine that had published an article about his involvement in the lawsuit. The Supreme Court held that the attorney's participation in the action against the policeman did not make him a "public figure" under the *New York Times* rule even though the lawsuit was a matter of "public or general interest," and consequently it was not necessary for the attorney to prove *New York Times* "actual malice" in order to prevail in his libel action.

114. 424 U.S. 448 (1976). See text accompanying note 37, *supra*. The plaintiff in this action was a prominent member of Palm Beach society circles and the wife of the heir to the Firestone rubber fortune. Her husband divorced her and Time magazine reported, inaccurately, that adultery was one of the grounds upon which the divorce was granted. Mrs. Firestone then sued for libel. The Supreme Court held that resort to the courts to obtain a divorce did not constitute a "public controversy" for constitutional purposes, and it did not represent the voluntary offering of one's reputation for public scrutiny. For these reasons, Mrs. Firestone was neither a voluntary, nor an involuntary public figure, and she did not have to prove *New York Times* "actual malice" in order to win her libel case.

115. 441 U.S. 153 (1979). In this case, the plaintiff, a former U.S. Army officer who had gained national prominence during the latter stages of the Vietnam War when he accused several superior officers of concealing war atrocities, was an admitted public figure. He

tection extended to news media in libel actions is also by no means absolute.

With respect to injury and recourse, the private citizen who has been defamed by the news media is much like the private individual whose commercial reputation has been unfairly impaired by a credit reporting agency. Both persons are susceptible to devastating injury, and as private citizens, both are unlikely to enjoy access to channels of communication that would effectively enable them to correct the erroneous or malicious impressions that already have been circulated about them. Because of their high vulnerability, the state interest in protecting private individuals is, as Justice Powell observed in *Gertz*, correspondingly great.¹¹⁶

This discussion is not meant to imply that the two types of libel are the same in all respects. Nor is it meant to suggest that Congress could — or would want to — deal with the potential future problem of interstate libel transported to thousands or even millions of readers instantaneously by means of a huge computer network by passing a federal defamation law similar to the FCRA. Drafting such a statute would not be a simple task, and in the context of extremely broad constitutional protection for the traditional organized press, it is possible that any federal defamation law would be subject to overbreadth or void-for-vagueness challenges.¹¹⁷ Those considerations aside, however, it must be acknowledged that, since the 1964 decision in *New York Times Co. v. Sullivan*, the United States has had a federal common law of defamation that does to some extent preempt the traditional state law in this area.¹¹⁸ Congress has never seen any reason to enact this federal common law in statutory form. However, automation of the newspaper delivery system has not yet occurred to any significant degree, and computerized libel by the press does not present the same problems that automation already had brought to the credit reporting industry by the late 1960s.

brought a libel action against several people involved in the production of a segment on the CBS documentary news program "60 Minutes" that questioned the truthfulness of his charges. The Supreme Court held that the plaintiff was entitled to conduct discovery into the state of mind of the defendants during their preparation of the program in order to establish the possible existence of *New York Times* "actual malice," and that such discovery did not violate the First Amendment's protection of the editorial process.

116. 418 U.S. at 344, 348.

117. See, e.g., *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Cox v. Louisiana*, 379 U.S. 536 (1965).

118. See W. PROSSER, *supra* note 26, § 118; L. ELDREDGE, *supra* note 26, § 51.

If defamation truly does not rise to the level of constitutional sanctity,¹¹⁹ and if remedies were so tailored as to affect the press only after publication and not before,¹²⁰ then logically it seems that a federal defamation statute would not violate the First Amendment.¹²¹ It is, of course, possible that Congress might never find it necessary to adopt such a law for any number of reasons, including the obvious political difficulties that such a proposal would encounter. Regardless of any legislative response, however, it is the contention of this article that the federal and state courts will have to be more alert to the problem of the adequacy of remedies in the future era of the telescreen newspaper. Courts have shown a growing willingness to consider equitable relief in cases involving consumer credit reporting defamation and non-media libel. Such relief, if maintained within constitutional bounds, might also be applied to the electronic newspaper as well.

VI. Conclusion

Experts in both the newspaper and computer industries acknowledge that the telescreen or electronic newspaper, prepared with the essential and extensive aid of computers and transmitted onto the home television screen through either the telephone network or the broadcaster's signal, will be the inevitable product of a

119. See notes 54 & 55 and accompanying text, *supra*.

120. See notes 56, 76 & 77 and accompanying text, *supra*. One argument that advocates of any proposed federal defamation statute would likely encounter is the contention that no such statute could be so tailored as to affect the press only after publication, because even if relief were somehow limited to post-publication equities, the "chilling effect" resulting from the mere existence of such a law would have an inhibiting pre-publication impact upon the gathering and editing of news. Of course, journalists have always worked with the knowledge that what they put into print may come back to haunt them through a lawsuit for libel. This spectre does not appear to have generally slowed the American press, although it might be possible for journalistic historians to cite specific examples where such a fear resulted in the quashing of a particular story.

121. Congress could rely on either the commerce clause, see note 111, *supra*, or the necessary and proper clause for authority to enact a federal defamation statute. Computerized newspapers, and libelous stories they might contain, would be articles of interstate commerce. Under the necessary and proper clause, Congress would be acting under its authority to legislate in order to carry out the constitutional responsibilities of other departments of government: in this case, enforcing the Supreme Court's pronouncements on libel found in such decisions as *New York Times v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). The Constitution provides, in pertinent part: "Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution . . . all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." U.S. CONST. art. I, § 8, cl. 18.

spiraling trend toward automation in the newspaper business. Legal scholars also should recognize this likelihood, and should begin considering what impact it will have on the various tenets of American press law.

In the area of defamation, information from electronic newspaper transmission might permit courts to gauge more accurately the extent of a libel's circulation and thus assist in determining the proper value of damages to be awarded. A more important issue that will be raised, however, by the advent of the telescreen newspaper is the question whether, and to what degree, traditional damage remedies will remain adequate to compensate victims of defamation. When stories published years before can be easily viewed by readers throughout the country at the mere touch of a few buttons, then both the single publication rule and the already eroded maxim that courts will not provide equitable relief when publication is involved may have to be abandoned as obsolete.

A growing number of courts have held in recent years that they can grant injunctive relief to libel plaintiffs in a variety of contexts, including trade libels upon property,¹²² tortious invasions of the personal right of privacy,¹²³ and maliciously erroneous commercial credit reporting.¹²⁴ The courts also have held that injunctions against defamation can be secured where non-media defendants are involved even though the injunctive action may infringe First Amendment rights.¹²⁵ In such instances, a balancing test has been applied to weigh the varying values of conflicting constitutional claims. This balancing approach also must be utilized when the press is involved as a defendant, but equity cannot be invoked to prevent initial publication. In order to remain faithful to the commandment of the First Amendment, a court could grant equitable relief only after publication has taken place.

The answer to this technological and legal problem might be found, in part, through the technology itself. It will be possible in the future to change newspaper "morgue" computer tapes in order to indicate that the story being seen on the screen was, after initial publication, found by a court of law to be libelous. Other, even more radical solutions also may be considered, but courts and legislatures will have to tread lightly here to avoid fashioning reme-

122. See notes 58 through 63 and accompanying text, *supra*.

123. See note 69 and accompanying text, *supra*.

124. See notes 92 and 106 and accompanying text, *supra*.

125. See notes 63, 69 and 72 and accompanying text, *supra*.

dies that otherwise infringe the constitutional freedom of the press.

If the problem of computer-aided defamation in consumer credit reporting is treated as being at least somewhat analogous, then it can be argued that the development of the electronic newspaper on a nationwide scale might eventually require Congress to provide a statutory plan of libel relief similar to that embodied in the federal Fair Credit Reporting Act. If defamation is not regarded as qualifying for full First Amendment protection, then such a statute will probably be held constitutional. The more likely forum for the creation of a legal standard will, however, be the courts, and as computerization increases the potential for libelous harm, the judiciary will have to demonstrate great imagination, little dogmatism, and a healthy respect for both a free press and the occasional victim of its valued reporting.

